STATE OF MICHIGAN

COURT OF APPEALS

SPECTRUM HEALTH,

Plaintiff-Appellee,

v

TITAN INSURANCE COMPANY,

Defendant-Appellant,

and

BLUE CROSS BLUE SHIELD,

Defendant.

UNPUBLISHED
April 8, 2008

No. 275341
Ionia Circuit Court
LC No. 06-024796-NF

Before: Fort Hood, P.J., and Talbot and Servitto, JJ.

PER CURIAM.

In this action for recovery of no-fault personal injury protection (PIP) benefits, defendant Titan Insurance Company appeals as of right, challenging the trial court's orders awarding plaintiff Spectrum Health no-fault penalty interest of $1,624.44, and no-fault attorney fees of $3,682.50. We affirm.

Keely Gutierrez-Baca and her two minor children, Neena and Timothy, were injured in an automobile accident on May 19, 2005. Neither Gutierrez-Baca nor the vehicle she was driving was covered by a no-fault insurance policy. However, Gutierrez-Baca was covered by an employer-funded ERISA[1] health insurance plan with Blue Cross Blue Shield ("BCBS").

On July 7, 2005, the Assigned Claims Facility (ACF) made an initial determination that Gutierrez-Baca's children were entitled to PIP benefits and assigned Neena's claim to defendant because no other applicable PIP coverage had been identified. Shortly thereafter, Timothy's claim was also assigned to defendant. Shortly after receiving the files, defendant independently determined that both children were eligible for PIP benefits. By December 2005, defendant had

[1] Employment Retirement Income Security Act, 29 USC 1001 *et seq.*

received the billing and medical records for each child, including an explanation of benefits from BCBS indicating that the automobile carrier was primarily liable for coverage. When defendant still had not paid plaintiff's claims by May 17, 2006, plaintiff filed this action. On June 1, 2006, after receiving a summary of Gutierrez-Baca's health plan (confirming that defendant was primarily liable for the medical expenses), defendant paid plaintiff's claims in full.

The trial court determined that the PIP benefits were overdue and, therefore, awarded plaintiff 12 percent interest pursuant to MCL 500.3142(3). Additionally, it determined that defendant unreasonably delayed in making payment and, therefore, awarded plaintiff attorney fees pursuant to MCL 500.3148(1).

On appeal, defendant argues that the PIP benefits were not overdue, and that it did not unreasonably delay in paying the benefits, because it promptly paid the benefits upon receiving proof that it, rather than BCBS, was primarily liable for plaintiff's claims.

A trial court's award of penalty interest under MCL 500.3142, and a trial court's factual findings regarding an award of attorney fees under MCL 500.3148, are both reviewed for clear error. *Borgess Medical Ctr v Resto*, 273 Mich App 558, 576; 730 NW2d 738 (2007), lv app held in abeyance 739 NW2d 83 (2007).

MCL 500.3142 provides, in pertinent part:

> (1) Personal protection insurance benefits are payable as loss accrues.
>
> (2) Personal protection insurance benefits are overdue if not paid within 30 days after an insurer receives reasonable proof of the fact of the amount of loss sustained. . . .
>
> (3) An overdue payment bears simple interest at the rate of 12% per annum.

Additionally, MCL 500.3148(1) provides:

> An attorney is entitled to a reasonable fee for advising and representing a claimant in an action for personal or property protection insurance benefits which are overdue. The attorney's fee shall be a charge against the insurer in addition to the benefits recovered, if the court finds that the insurer unreasonably refused to pay the claim or unreasonably delayed in making proper payment.

We disagree with defendant's argument that the PIP benefits were not overdue because it was ready to pay benefits immediately, but it had not received verification that BCBS was not primarily liable because Guiterrez-Baca had an employer-funded ERISA health plan with a coordination of benefits clause.[2] MCL 500.3142(2) provides that PIP benefits are overdue "if

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[2] The coordination clause in ERISA preempts the coordination clause in the no-fault act. *Auto Club Ins Ass'n v Frederick & Herrud, Inc (After Remand)*, 443 Mich 358, 361, 387; 505 NW2d (continued…)

not paid within 30 days after an insurer receives reasonable proof of the fact of the amount of *loss sustained*." (Emphasis added.) Thus, it is proof of the fact of the amount of "loss sustained" by the claimant that determines when PIP benefits become overdue. By December 2005, defendant had confirmed the eligibility of each child for PIP benefits and had received each child's billing and medical records establishing the fact of the amount of the loss. Any uncertainty defendant may have had with respect to priority between it and BCBS was not relevant to whether the PIP benefits were overdue under MCL 500.3142(2). As this Court observed in *Davis v Citizens Ins Co of America*, 195 Mich App 323, 328; 489 NW2d 214 (1992), "[p]enalty interest must be assessed against a no-fault insurer if the insurer refused to pay benefits and is later determined to be liable, irrespective of the insurer's good faith in not promptly paying the benefits."

Because it is undisputed that the PIP benefits were not paid within 30 days after defendant received proof of the fact of the amount of loss sustained by plaintiff, the trial court properly awarded 12-percent interest under MCL 500.3142(3).

Defendant's liability for attorney fees under MCL 500.3148(1) depends on whether it unreasonably delayed in making proper payment. "When an insurer refuses to make or delays in making payment, a rebuttable presumption arises that places the burden on the insurer to justify the refusal or delay." *Attard v Citizens Ins Co of America*, 237 Mich App 311, 317; 602 NW2d 633 (1999). The relevant inquiry "is not whether coverage is ultimately determined to exist, but whether the insurer's initial refusal to pay was reasonable." *Shanafelt v Allstate Ins Co*, 217 Mich App 625, 635; 552 NW2d 671 (1996).

We agree with the trial court that defendant's delay in paying the PIP benefits, because of its uncertainty whether BCBS was primarily or secondarily liable for the medical expenses, was unreasonable and served only to frustrate the purpose of the no-fault act. *Borgess Medical Ctr*, *supra* at 580. "[A]bsolutely no language in the assigned-claims provision of the no-fault act specifically relieves an insurer to whom the Assigned Claims Facility has assigned a claim of its obligation to pay benefits on the basis that the assigned insurer later discovers another applicable insurer." *Spencer v Citizens Ins Co*, 239 Mich App 291, 305; 608 NW2d 113 (2000). Moreover, "when the only question is which of two insurers will pay, it is unreasonable for an insurer to refuse payment of benefits." *Regents of the Univ of Michigan v State Farm Mut Ins Co*, 250 Mich App 719, 737; 650 NW2d 129 (2002).

Although defendant stresses the importance and difficulty in ascertaining the exact amount of benefits it was liable to pay, it is "the purpose of the no-fault act to provide accident victims with assured, adequate, and prompt reparations," and defendant was not permitted "to ignore definite but inexact claims." *Williams v AAA Michigan*, 250 Mich App 249, 267; 646 NW2d 476 (2002). It was enough that defendant was aware that it had a place in the priority chain and that plaintiff was entitled to payment from someone within that chain. See *Darnell v Auto-Owners Ins Co*, 142 Mich App 1, 13; 369 NW2d 243 (1985).

(…continued)

820 (1993).

The trial court did not clearly err in determining that defendant unreasonably delayed in paying the PIP benefits and, therefore, was liable for attorney fees under MCL 500.3148(1).

Affirmed.

/s/ Karen M. Fort Hood
/s/ Michael J. Talbot
/s/ Deborah A. Servitto